

12-27

BY FAX

DURIE TANGRI LLP
SONAL N. MEHTA (SBN 222086)
smehta@durietangri.com
JOSHUA H. LERNER (SBN 220755)
jlerner@durietangri.com
LAURA E. MILLER (SBN 271713)
lmiller@durietangri.com
CATHERINE Y. KIM (SBN 308442)
ckim@durietangri.com
ZACHARY G. F. ABRAHAMSON (SBN 310951)
zabrahamson@durietangri.com
217 Leidesdorff Street
San Francisco, CA 94111
Telephone: 415-362-6666
Facsimile: 415-236-6300

Attorneys for Defendants
Facebook, Inc., Mark Zuckerberg, Christopher Cox, Javier
Olivan, Samuel Lessin, Michael Vernal, and Ilya Sukhar

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN MATEO

SIX4THREE, LLC, a Delaware limited liability
company,

Plaintiff,

v.

FACEBOOK, INC., a Delaware corporation;
MARK ZUCKERBERG, an individual;
CHRISTOPHER COX, an individual;
JAVIER OLIVAN, an individual;
SAMUEL LESSIN, an individual;
MICHAEL VERNAL, an individual;
ILYA SUKHAR, an individual; and
DOES 1-50, inclusive,

Defendants.

FILED
SAN MATEO COUNTY

APR 11 2019

Clerk of the Superior Court

CLERK


Case No. CIV 533328.

Assigned for all purposes to Hon. V. Raymond
Swope, Dept. 23

**DEFENDANT FACEBOOK, INC.'S EX
PARTE APPLICATION FOR AN ORDER
SHORTENING TIME FOR DEPOSITIONS**

Dept: 23 (Complex Civil Litigation)
Judge: Honorable V. Raymond Swope

FILING DATE: April 10, 2015
TRIAL DATE: April 25, 2019

CIV533328
EPA
Ex Parte Application
1762382


RECEIVED
APR 11 2019
SUPERIOR COURT
CIVIL DIVISION

1 Defendant Facebook, Inc. ("Facebook") applies *ex parte* for an order shortening time for
2 depositions.

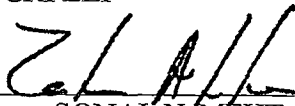
3 Notice of this application was provided to Plaintiff Six4Three, LLC ("Six4Three"), Birnbaum &
4 Godkin, LLP, Mr. Gross, Gross & Klein LLP, Mr. Kramer, and Mr. Scaramellino, via email on April 10,
5 2019. In addition, Facebook has provided this application and supporting papers to all counsel of record
6 and counsel for Birnbaum & Godkin, LLP, Mr. Gross, Gross & Klein LLP, Mr. Kramer, and Mr.
7 Scaramellino.

8 This application is based upon the Memorandum of Points and Authorities, the Declaration of
9 Zachary G.F. Abrahamson, and such additional evidence and argument as may be presented at or before
10 any hearing on this matter.

11
12 Dated: April 11, 2019

DURIE TANGRI LLP

13
14 By: _____


SONAL N. MEHTA
JOSHUA H. LERNER
LAURA E. MILLER
CATHERINE Y. KIM
ZACHARY G. F. ABRAHAMSON

15
16
17 Attorneys for Defendants
18 Facebook, Inc., Mark Zuckerberg, Christopher Cox,
19 Javier Olivan, Samuel Lessin, Michael Vernal, and Ilya
20 Sukhar
21
22
23
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

It has been twenty-six days since the Court authorized discovery to allow the Court and Facebook to understand the scope of Six4Three and its legal team's breach of multiple court orders and the extent to which the relevant individuals were involved. Since then, Facebook has received *zero* additional information or discovery relating to those breaches—Mr. Scaramellino's attorney refuses to accept service of a subpoena or tell Facebook where Mr. Scaramellino can be found (and Facebook's attempts to serve him at every residential or business address that Mr. Scaramellino and/or his counsel have identified in the past have failed), and Six4Three's lawyers have lodged numerous objections to Facebook's subpoenas (including objections for which they could not plausibly have any good-faith basis) but have failed to make themselves available in response to multiple requests by Facebook to even meet and confer on those objections.

Meanwhile, Six4Three has spent the last month doggedly pursuing its agenda to publicize its false narrative about Facebook, using the information it obtained under this Court's protective order to try to lend credibility to its fanciful allegations. Beginning in late February and continuing to as recently as last week, Six4Three began posting online about this case and Facebook, apparently in an effort to bring more media and public attention to the documents it leaked and its campaign against Facebook. And on Tuesday night, Facebook received an email from a national broadcast network in the United States advising Facebook that the network has obtained [REDACTED]

[REDACTED] Just based on the number of pages, the scope of this leak appears to be broader than the documents Mr. Kramer previously suggested he had leaked to the DCMS Committee (i.e., the Godkin Declaration and exhibits). Facebook has no idea when these documents were leaked or to whom—indeed, the network's e-mail suggests that entities besides the DCMS Committee received significant troves of confidential and highly confidential information from this case. What Facebook does know—from the media outlet itself—is that [REDACTED]

1 [REDACTED]¹ See generally
2 Abrahamson Decl. in Supp. of Facebook's *Ex Parte* Appl. submitted herewith ("Abrahamson Decl."),
3 Ex. 2.

4 In other words, Six4Three and its legal team have apparently had no issue continuing to engage
5 with the media on these issues even as they refuse to engage in good faith in the discovery process this
6 Court has ordered to get to the bottom of their crime or fraud. And while Six4Three continues to be
7 permitted to pursue its agenda online and in the media, the prejudice to Facebook is compounding. With
8 every passing day, Facebook receives fresh information—not through the discovery process and not from
9 Six4Three or its legal team, but from the media—that the leaks go broader and deeper than Facebook or
10 the Court knew and that Six4Three continues to seek to exploit the leaked documents for its own ends.

11 At this point, Facebook and Court simply cannot wait weeks or months for the discovery process
12 to play out to learn basic facts about what was leaked and to whom. To be sure, a full investigation will
13 be required and will take time. But there is threshold information Facebook is entitled to *now*. Facebook
14 asks that the Court order (1) Mr. Kramer and Mr. Scaramellino to each sit for a two-hour deposition by
15 April 15, or in the alternative to appear live in court on April 15 for examination by the Court and
16 Facebook's counsel; and (2) that, within 48 hours of receiving Mr. Scaramellino and Mr. Kramer's
17 emails from Stroz Friedberg, the neutral forensic examiner produce to both sides all emails to and from
18 the specific email domains identified in Exhibit 3 of the Abrahamson Declaration, attached hereto (i.e.,
19 email domains for the media entities with whom it appears Six4Three and its legal team were discussing
20 Facebook's confidential and highly confidential information). These limited steps are critical to allowing
21 Facebook and the Court to understand what Facebook confidential and highly confidential information is
22 still out there, who might have it, what Six4Three continues to do with it, and what steps the Court can
23 take to stop the leaks from proliferating. Anything less would give Six4Three weeks, if not months, to
24 continue to leverage the documents it leaked in violation of the Court's orders while continuing to keep
25 Facebook and the Court in the dark on what was leaked in the first place.

26
27
28 1 [REDACTED]

1 **II. BACKGROUND**

2 **A. Six4Three and its Legal Team Continue to Violate the Court's Orders**

3 On April 9, 2019, a reporter contacted Facebook and said [REDACTED]

4 [REDACTED]
5 [REDACTED] Abrahamson
6 Decl., Ex. 1. The reporter quoted a series of exhibits to the Declaration of David Godkin in Opposition
7 to the Individual Defendants' Anti-SLAPP motion, many of which had not been previously published by
8 the DCMS Committee (or anyone else, to Facebook's knowledge). But this new leak appears to go far
9 beyond the Godkin Declaration. The sheer volume of documents makes that plain: the Godkin
10 Declaration contained approximately 3,800 pages of Facebook confidential information, whereas this
11 new leak apparently includes an additional 3,200 pages. The reporter also quoted from a highly
12 confidential document produced in this litigation but *not* attached as an exhibit to the Godkin
13 Declaration. *See id.* Facebook has not identified *any* prior filing to which that document was attached.
14 These quotations and the volume of Facebook confidential documents confirm, for the first time, that
15 Six4Three or its legal team disclosed confidential and highly confidential documents beyond the Godkin
16 Declaration in violation of this Court's orders. Worse, the reporter's e-mail suggests for the first time
17 that entities beyond the DCMS Committee received a document dump comprising thousands of pages of
18 confidential and highly confidential information. *See id.* (describing "[REDACTED]
19 [REDACTED]") (emphasis added).

20 On April 10, the reporter wrote to Facebook again. The reporter informed Facebook: [REDACTED]

21 [REDACTED]
22 [REDACTED] Abrahamson Decl., Ex. 2. If either Mr. Kramer or Mr. Scaramellino discussed with
23 the network Facebook's confidential and highly confidential information (even information that had
24 become public through the leaks), those discussions would be yet another violation of this Court's
25 protective order. *See Stip. Protective Order ¶¶ 3, 6* (Oct. 25, 2016).

26 **B. Meanwhile, Six4Three and its Legal Team Refuse to Participate in Discovery**

27 Within days of the Court's March 15 order authorizing discovery, Facebook served document
28 requests on Six4Three—seeking the documents of party-witness Ted Kramer—and served subpoenas on

1 Mr. Godkin and Mr. Gross. Abrahamson Decl. ¶ 5. Facebook also began a weeks-long effort to
2 subpoena Mr. Scaramellino. All three individuals needlessly delayed discovery: Mr. Godkin and Mr.
3 Gross refused to produce any documents on the basis of boilerplate, inapplicable objections and continue
4 to delay in meeting and conferring on those objections. *See* Abrahamson Decl., Exs. 4–8. Mr.
5 Scaramellino and his counsel Jack Russo, meanwhile, have refused to provide even a minimal level of
6 cooperation in the service of Mr. Scaramellino’s subpoena for nearly four weeks. Mr. Russo represented
7 to the Court that the Forestburgh, New York, address identified in the Court’s November 30, 2018 order
8 was Mr. Scaramellino’s address, but it was not. *See* Third Party Thomas Scaramellino & Theodore
9 Kramer’s Opp’n to Def. Facebook, Inc.’s Ex Parte Appl. re Thomas Scaramellino’s Address at 2 (Mar.
10 22, 2019); *see also* Abrahamson Decl., Exs. 9, 10 (emails re attempts to effect service on Mr.
11 Scaramellino). Then, after the Court suggested that Facebook serve Mr. Scaramellino at a business
12 address, Mr. Russo refused to provide such an address for service or accept service on his client’s behalf.
13 *See* Case Mgmt. Order No. 21 at 1 (Apr. 4, 2019); Abrahamson Decl. Ex. 11, Russo letter to Kim (Apr.
14 5, 2019). Facebook has now attempted service three times at two addresses, to no avail. Abrahamson
15 Decl. ¶ 14.

16 **III. ARGUMENT**

17 **A. The Court Should Grant Facebook Leave to Notice Depositions of Mr. Kramer and** 18 **Mr. Scaramellino on Shortened Time.**

19 Facebook respects the orderly discovery process contemplated by the Court. To that end,
20 Facebook served Six4Three with document requests and served subpoenas on Mr. Godkin and Mr.
21 Gross. Facebook also sank thousands of dollars in attempts to serve Mr. Scaramellino with a subpoena
22 for documents and continues to do so. Yet not a single document has been produced, and nearly six
23 months after Facebook and the Court first learned of their initial leaks, we are no closer to understanding
24 the scope of Six4Three and its legal team’s multiple breaches of the Court’s orders, including the leak
25 that Facebook learned of only this week.

26 In light of these circumstances, Facebook requests leave to notice depositions of Mr. Kramer and
27 Mr. Scaramellino on shortened time—specifically, for April 15, 2019. California’s Code of Civil
28 Procedure allows the Court shorten time on a deposition “for good cause shown.” *See* Civ. Proc. Code

1 § 2025.270(d) (“On motion or ex parte application of any party or deponent, for good cause shown, the
2 court may shorten or extend the time for scheduling a deposition[.]”). Here, good cause exists because
3 document leaks continue to mushroom and Facebook’s best mechanism to learn the source of those leaks
4 is through the testimony of Mr. Kramer and Mr. Scaramellino. Depositions—beginning with depositions
5 of Mr. Kramer and Mr. Scaramellino—can reveal what information Six4Three and its legal team shared
6 with the press, including the “ [REDACTED]
7 Indeed, the fact that [REDACTED]
8 [REDACTED] shows that depositions—not just documents—are necessary to investigate
9 Six4Three’s violations. Abrahamson Decl., Ex. 2 (emphasis added).

10 Facebook requests that the Court grant these immediate depositions without prejudice to
11 subsequent, more fulsome depositions of Mr. Kramer and Mr. Scaramellino once documents are
12 produced. Generally, natural persons in California are subject to deposition only once in the course of an
13 action. See Civ. Proc. Code § 2025.610(a). But there are exceptions to this rule, including where the
14 court grants leave “for good cause shown” to “take a subsequent deposition” of a person previously
15 deposed. *Id.* § 2025.610(b). Here, good cause exists for the Court to order two-hour depositions of Mr.
16 Kramer and Mr. Scaramellino now, while allowing Facebook to depose them again on a later date after
17 document production. The depositions must occur on an expedited schedule because substantial new
18 leaks continue to spring up while Six4Three and its counsel resist discovery. Facebook remains in the
19 dark as to the scope of Six4Three and its legal team’s violations of the Court’s orders, and waiting to
20 investigate this for weeks or potentially months longer² would continue to prejudice Facebook. Plus, Mr.
21 Kramer and Mr. Scaramellino will not be unduly burdened by these immediate depositions: Facebook
22 proposes two-hour examinations related to Mr. Kramer and Mr. Scaramellino’s communications with the
23 media. Both individuals are represented by counsel. And both individuals could sit for these depositions
24 in a single morning, or the depositions could take place back-to-back.

25
26
27 ² For example, at this point, it is unlikely that any issues with respect to Facebook’s document requests to
28 Mr. Scaramellino could be resolved at the April 26 discovery conference because Facebook still has not
been able to serve him.

1 **B. In the Alternative, Good Cause Exists to Compel the Appearance and Testimony of**
2 **Mr. Kramer and Mr. Scaramellino.**

3 Even if the Court is disinclined to order preliminary depositions, it has other means to learn this
4 information quickly. In particular, the Court may order Mr. Kramer and Mr. Scaramellino to appear and
5 testify about their disclosures to media entities, including the reporter that contacted Facebook on April 9
6 and 10. As Facebook explained at length in its February *ex parte* application, the Court unquestionably
7 has authority to enforce its orders and control the proceedings before it. *See generally* Facebook *Ex*
8 *Parte* Appl. for Order Enforcing Stip. Protective Order at 10-11 (Feb. 25, 2019) (citing Civ. Proc. Code
9 §§ 128, 187 & 2031.060; *Cates v. Cal. Gambling Control Comm’n*, 154 Cal. App. 4th 1302, 1314 (2007)
10 & *Koehler v. Superior Court*, 181 Cal. App. 4th 1153, 1157 (2010)). Indeed, section 128(a)(6) of the
11 Code of Civil Procedure specifically provides the Court with power “[t]o compel the attendance of
12 persons to testify in an action or proceeding pending therein[.]” Civ. Proc. Code § 128(a)(6); *see also*
13 *Silvagni v. Superior Court (Youngblood)*, 157 Cal. App. 2d 287, 292 (1958) (discussing “the
14 unquestioned power of the court to compel [a civil litigant] as a witness.”). That power is protected by
15 those provisions of California’s Code of Civil Procedure that let the Court issue bench warrants for
16 failure to appear. *See, e.g.*, Civ. Proc. Code § 1993(a)(1) (“[T]he court may issue a warrant for the arrest
17 of . . . a person who failed to appear pursuant to a court order.”). So the Court would be well within its
18 discretion to compel Mr. Kramer and Mr. Scaramellino to appear and testify about their communications
19 about this case with media organizations.

20 **C. The Court Should Expedite the Production of Communications Between Six4Three**
21 **and Its Legal Team and Third Parties.**

22 The broadcast network leak underscores the importance of learning what communications
23 Six4Three and its legal team had with members of the media and other third parties. As Facebook has
24 previously shown, no possible privilege can attach to such communications, even apart from the Court’s
25 ruling on the crime-fraud exception. *See* Facebook’s Opp’n to Birnbaum & Godkin, LLP and Gross &
26 Klein LLP’s *Ex Parte* Appl. for Order Staying All Disc. Proceedings at 6:1-18 (Mar. 27, 2019).
27 Accordingly, Facebook requests that the Court order Vestigant—the neutral third party forensic examiner
28 appointed in this matter, *see* Case Mgmt. Order No. 22 (Apr. 2, 2019)—to produce such communications

1 within 48 hours of receiving data from Stroz Friedberg. To further this request, Facebook encloses with
2 this *ex parte* a list of third-party e-mail domains with which Six4Three or its legal team are known to
3 have communicated.³ Using this list, the neutral examiner can quickly identify documents relevant to
4 Six4Three's leaks. Accordingly, Facebook requests that the Court order Vestigant to produce
5 communications to, from, or copying those third-party e-mail domains within 48 hours of receiving data
6 from Stroz Friedberg. The parties and Court can then continue to work out the rest of the protocol for the
7 forensic examiner to investigate the breaches of the Court's order and to produce relevant documents.

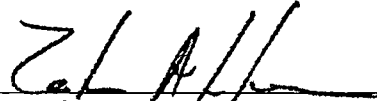
8 **IV. CONCLUSION**

9 For the foregoing reasons, the Court should grant Facebook's *ex parte* application for an order
10 shortening time on the depositions of Ted Kramer and Thomas Scaramellino, or, in the alternative, for an
11 order compelling their appearance and testimony. The Court should further grant Facebook's request for
12 an order expediting production of Six4Three and its legal team's third-party communications.

13 Dated: April 11, 2019

DURIE TANGRI LLP

14 By: _____



SONAL N. MEHTA

JOSHUA H. LERNER

LAURA E. MILLER

CATHERINE Y. KIM

ZACHARY G. F. ABRAHAMSON

18 Attorneys for Defendants

19 Facebook, Inc., Mark Zuckerberg, Christopher Cox,
20 Javier Olivan, Samuel Lessin, Michael Vernal, and Ilya
21 Sukhar

22
23
24
25
26
27 ³ Facebook derived this list from productions made by Six4Three's lawyers at Birnbaum & Godkin, LLP
28 and Gross & Klein LLP.

PROOF OF SERVICE

I am employed in San Francisco County, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a party to the within action. My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

On April 11, 2019, I served the following documents in the manner described below:

**DEFENDANT FACEBOOK, INC.'S EX PARTE APPLICATION FOR AN ORDER
SHORTENING TIME FOR DEPOSITIONS**

☒ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Durie Tangri's electronic mail system from zabrahamson@durietangri.com to the email addresses set forth below.

On the following part(ies) in this action:

Stuart G. Gross
GROSS & KLEIN LLP
The Embarcadero, Pier 9, Suite 100
San Francisco, CA 94111
sgross@grosskleinlaw.com

David S. Godkin
James Kruzer
BIRNBAUM & GODKIN, LLP
280 Summer Street
Boston, MA 02210
godkin@birnbaumgodkin.com
kruzer@birnbaumgodkin.com

*Attorneys for Plaintiff
Six4Three, LLC*

Donald P. Sullivan
Wilson Elser
525 Market Street, 17th Floor
San Francisco, CA 94105
donald.sullivan@wilsonelser.com
Joyce.Vialpando@wilsonelser.com
Dea.Palumbo@wilsonelser.com

Attorney for Gross & Klein LLP

Jack Russo
Christopher Sargent
ComputerLaw Group, LLP
401 Florence Street
Palo Alto, CA 94301
jrusso@computerlaw.com
csargent@computerlaw.com
ecf@computerlaw.com


*Attorney for Theodore Kramer and Thomas
Scaramellino (individual capacities)*

Steven J. Bolotin
Morrison Mahoney LLP
250 Summer Street
Boston, MA 02210
sbolotin@morrisonmahoney.com
Llombard@morrisonmahoney.com

James A. Murphy
James A. Lassart
Thomas P Mazzucco
Joseph Leveroni
Murphy Pearson Bradley & Feeney
88 Kearny St, 10th Floor
San Francisco, CA 94108
JMurphy@MPBF.com
jlassart@mpbf.com
TMazzucco@MPBF.com
JLeveroni@MPBF.com

Attorney for Birnbaum & Godkin, LLP

1 I declare under penalty of perjury under the laws of the United States of America that the
2 foregoing is true and correct. Executed on April 11, 2019, at San Francisco, California.

3
4 
Zachary G. F. Abrahamson